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Jason Lawrence Stern

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## **Presentation**

*available at* <https://vimeo.com/64513586>

**Seton Hall University School of Law, *First Amendment Values***  
Spring 2013

Note

**Hear No Evil, Speak No Evil, Slurp No Evil:**  
*How the Recent N.Y.C. Ban on Sugary Drinks Will Stifle First Amendment Rights if Un-fizzled*

Jason L. Stern<sup>a</sup>

“For this is my blood, which confirms the covenant between God and his people. It is poured out as a sacrifice to forgive the sins of many.”

— Matthew 26:28

**I. Introduction**

The popular maxim “*you are what you eat*” originated in the 1800s with epicurean Anthelme Brillat-Savarin and philosopher Ludwig Feuerbach.<sup>1</sup> For centuries, authors,<sup>2</sup> celebrities,<sup>3</sup> artists<sup>4</sup> and politicians<sup>5</sup> have recognized the powerful relationship between man and food. Even Jesus used food to sacredly express himself.<sup>6</sup> Food and drink are tools by which a person can project thoughts, feelings and attitude to the world.<sup>7</sup> Indeed, nothing says, “I love you” like chocolate.<sup>8</sup> Peaches scream, “It is summer time!”<sup>9</sup> And a bottle of champagne signals celebration.<sup>10</sup>

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<sup>1</sup> Jacqueline Vanacek, *Nutrigenomics: You Really Are What You Eat*, FORBES (2012), <http://www.forbes.com/sites/sap/2012/10/09/nutrigenomics-the-study-of-you-are-what-you-eat/>.

<sup>2</sup> See e.g., *Quotes about Food*, GOODREADS (2012), <http://www.goodreads.com/quotes/tag/food>. Charles Bernard Shaw once exclaimed, “There is no love sincerer than the love of food.” *Id.*

<sup>3</sup> See e.g., *Famous Food Quotes*, DELISH (2012), <http://www.delish.com/recipes/cooking-recipes/famous-food-quotes-sayings>. Actress Sophia Lauren once publically said, “Everything you see I owe to spaghetti.” *Id.*

<sup>4</sup> See e.g., Renee Magritte, *The Son of Man*, available on WIKIPAINTINGS (2012), <http://www.wikipaintings.org/en/rene-magritte/son-of-man-1964>.

<sup>5</sup> See *supra* note 2. Ronald Reagan once said, “You can tell a lot about a fellow's character by his way of eating jellybeans.” *Id.*

<sup>6</sup> See e.g., Matthew 26:26-28, BIBLEGATEWAY.COM (2012), <http://www.biblegateway.com>. Jesus gives a piece of bread to his disciples and says, “Take and eat; this is my body.” *Id.* Then he gives wine to his disciples and says, “Drink from it, all of you. This is my blood of the covenant, which is poured out for many for the forgiveness of sins.” *Id.*

<sup>7</sup> Michael Owen Jones, *Food Choice, Symbolism, and Identity: Bread-and-Butter Issues for Folkloristics and Nutrition Studies*, J. AM. FOLKLORE 129 (2007).

<sup>8</sup> *Nothing Says I Love You Like Chocolates*, NEWS 8 (2013), available at [http://www.wtnh.com/dpp/news/fairfield\\_cty/nothing-says-i-love-you-like-chocolates#.USlcVqUhurU](http://www.wtnh.com/dpp/news/fairfield_cty/nothing-says-i-love-you-like-chocolates#.USlcVqUhurU).

<sup>9</sup> Heather Hunsaker, *Nothing Says It's Summertime like Peaches*, TIMES-HERALD (2012), available at

Americans may have lost sight of the ways in which food can act as a signifier,<sup>11</sup> yielding instead to the agenda of a food industry more concerned with profit than nutrition.<sup>12</sup> Furthermore, marketing campaigns strategically drive consumers towards cheap food that is quick to manufacture.<sup>13</sup> Those factors have contributed to a culture of gluttony<sup>14</sup> and an obesity epidemic in this country,<sup>15</sup> both of which, in turn, have spawned a weight-loss cultural frenzy that vilifies certain foods and certain beverages.<sup>16</sup>

Over the last thirty years, obesity has grown exponentially in the United States.<sup>17</sup> In the mid-1970s, fifteen percent of adults in this nation were obese.<sup>18</sup> Today, more than thirty-three percent of adults are medically obese.<sup>19</sup> This epidemic has tremendous health and financial consequences, not only for those drastically overweight, but also for the entire population as well.<sup>20</sup> As a result, many cities across the country including San Francisco, Philadelphia and

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<http://www.times-herald.com/close-up/20120614-summer-peaches-recipe-MOS>.

<sup>10</sup> Becky Sue Epstein, *Champagne: A Global History* (2013), <http://beckysueepstein.com/books/champagne-global-history/>.

<sup>11</sup> For a discussion of semiotics and the ways in which food & drink may act as personal signifiers, see *infra* Part II.

<sup>12</sup> Michelle Simon, *Food Politics*, APPETITE FOR PROFIT (2013), <http://www.appetiteforprofit.com/faqs/food-politics/>.

<sup>13</sup> See generally, Franklin Smith, *Where Have We Seen This Before?: Comparing the "Natural" Caloric-Sweetened Beverage Trend to the Claims of "Light" Cigarettes*, 24 LOY. CONSUMER L. REV. 389, 389-411 (2012). See also MICHAEL MOSS, *SALT SUGAR FAT: HOW THE FOOD GIANTS HOOKED US* (2013). Michael Moss, a Pulitzer-Prize winning reporter for The New York Times, discusses how the food industry exploits individuals' cravings for salt, sugar and fat by aggressively marketing junk food to children and the poor. Moss specifically investigates how soda-industry giants, like Coca-Cola and Dr. Pepper, hire food scientists to create soft drinks palatable to a wide audience that will yield high demand and profit but carry little, if any, nutritional value. *Id.* at 15-40.

<sup>14</sup> Yoni Freedhoff, *Is America Really a Nation of Lazy Gluttons?*, U.S. NEWS AND WORLD REP. (2012), available at <http://health.usnews.com/health-news/blogs/eat-run/2012/09/05/is-america-really-a-nation-of-lazy-gluttons>.

<sup>15</sup> *Id.*

<sup>16</sup> See e.g., CBS NEWS, *THE AXIS OF FOOD EVIL: FAT, SUGAR AND SALT* (2009); [http://www.cbsnews.com/8301-3445\\_162-5419299/the-axis-of-food-evil-fat-sugar-and-salt/](http://www.cbsnews.com/8301-3445_162-5419299/the-axis-of-food-evil-fat-sugar-and-salt/).

<sup>17</sup> See *supra* note 13.

<sup>18</sup> PRESIDENT'S COUNCIL ON FITNESS, SPORTS & NUTRITION, *FACTS & STATISTICS* (2013), <http://www.fitness.gov/resource-center/facts-and-statistics/>.

<sup>19</sup> Merrill Goozner, *Public Health Advocates Prepare For Another Calorie Battle: Push for Restaurants to Put Calories on Menus as a Way to Combat the Growing Obesity Problem*, HEALTHCARE J. OF NORTHERN CA (2007), <http://www.hcjcnc.com>; see also Cynthia L. Ogden, *The Epidemiology of Obesity*, GASTROENTEROLOGY 132, 2087, 2087 (2007).

<sup>20</sup> CENTER FOR DISEASE CONTROL, *OVERWEIGHT AND OBESITY* (2013), available at <http://www.cdc.gov/obesity/adult/causes/index.html>.

New York City have implemented programs and laws to try to curtail weight gain.<sup>21</sup>

This Note will focus on action taken by New York City to curtail the obesity epidemic, and specifically, its recent attempt to ban the sale of oversized sugary drinks. Section 81.53 of the Rules of the City of New York (referred to here as “the 16 oz. soda ban” and “§ 81.53”), was overturned by a Manhattan State Supreme Court judge on March 11, 2013, on the eve of its implementation.<sup>22</sup> The judge labeled the regulation as “arbitrary and capricious”<sup>23</sup> and found that the city’s Board of Health lacked the authority to promulgate such a rule.<sup>24</sup> On March 28, 2013, Mayor Bloomberg and the Board of Health appealed the judge’s decision, arguing that the ban should go into effect.<sup>25</sup>

While the regulation, if imposed, might very well be arbitrary and capricious, it appears that § 81.53 would deprive New Yorkers of more than just an oversized sugary drink.<sup>26</sup> Given the expressional values attached to food, the case can be made that the New York City ban on sugary drinks also severely jeopardizes First Amendment values. This Note asserts that New York City, in trying to combat obesity, has enacted legislation that compromises traditional notions of the First Amendment. Second, this Note argues that § 81.53, the recent attempt to ban oversized sugary drinks, suppresses the beverage industry’s speech, the distributor’s speech and the consumer’s speech. Third, this Note addresses important countervailing considerations in this free speech debate: that § 81.53 of the Rules of the City of New York does not pose an absolute ban on soda and that the ban falls wholly outside of a “Madisonian”<sup>27</sup> conception of the

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<sup>21</sup> Ashley Arthur, *Combating Obesity: Our Country's Need for A Nat'l Standard to Replace the Growing Patchwork of Local Menu Labeling Laws*, 7 IND. HEALTH L. REV. 305, 317 (2010).

<sup>22</sup> See *infra* discussion Part II.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> Deepti Hajela, *N.Y. Appeals Ruling Striking Down Big Soda Ban*, ASSOCIATED PRESS (2013), <http://www.nbcnews.com/business/new-york-appeals-ruling-striking-down-big-soda-ban-1C9133956>.

<sup>26</sup> See *infra* discussion Part II.

<sup>27</sup> Richard J. Vangelisti, *Cass Sunstein's "New Deal" for Free Speech: Is It an "Un-American" Theory of Speech?*,

First Amendment. Finally, this Note concludes by offering education, coupled with stronger consumer protection laws, as an alternate method of solving the obesity epidemic. This Note closes by posing the question: “*How far is too far?*” and suggests that New York City’s recent regulation poses free-speech concerns which must be considered in order to preserve First Amendment values.

## II. Historical and Theoretical Antecedents: NYC’s Road to Becoming the “Nanny State”

The American Medical Association has long warned that proactive measures should be taken to limit caloric intake, especially in the form of “sweetened carbonated beverages.”<sup>28</sup> Nevertheless, consumption of sugary soft drinks is on the rise.<sup>29</sup> Between 1999 and 2001, sugary soft drinks comprised seven percent of all calories consumed by Americans, a nearly four percent increase from similar estimates taken thirty years ago.<sup>30</sup> In addition, portion sizes have exploded.<sup>31</sup> A soft drink at McDonald’s, for example, has increased in size 457% since 1955, from seven fluid ounces to thirty-two fluid ounces.<sup>32</sup> The number of calories and the amount of sugar has surged with the rise of these supersized drinks.<sup>33</sup>

To combat the increase in soft drink consumption (and caloric intake from sugar), the New York City Board of Health signed § 81.53 into the Rules of the City of New York in 2012, a regulation banning the sale of soft drinks larger than 16 oz. in stadiums, movie theaters and food carts.<sup>34</sup> The rule, first proposed by Michael Bloomberg,<sup>35</sup> the Mayor of New York City

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85 KY. L.J. 97, 99-100 (1997). The author notes that Sunstein’s conception of a “*Madisonian*” First Amendment is one that drives a deliberative democracy; that is, one that is rooted in politics. *Id.*

<sup>28</sup> MICHAEL F. JACOBSON, LIQUID CANDY: HOW SOFT DRINKS ARE HARMING AMERICAN’S HEALTH 2 (2005).

<sup>29</sup> See generally Jason P. Block et al., *Point-of-Purchase Price and Education Intervention to Reduce Consumption of Sugary Soft Drinks*, 100 AM. J. OF PUB. HEALTH 1427, 1427 (2010).

<sup>30</sup> *Id.*

<sup>31</sup> NYC.GOV, FROM SUPERSIZED TO HUMAN-SIZED: REINTRODUCING REASONABLE PORTIONS OF SUGARY DRINKS IN N.Y.C. (2013), [http://www.nyc.gov/html/doh/downloads/pdf/boh/max\\_size\\_sugary\\_drinks\\_briefing.pdf](http://www.nyc.gov/html/doh/downloads/pdf/boh/max_size_sugary_drinks_briefing.pdf).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> See The City Record: Official Journal of the City of N.Y., Sept. 21, 2012, at 2602-03 (to be codified in the Rules

(and adopted by the Board without any substantive changes), was supposed to go into effect on March 12, 2013.<sup>36</sup> However, on March 11, 2013, Manhattan Supreme Court Judge Milton Tingling stopped the city from enforcing the new regulation, stating that as written, § 81.53 was both “arbitrary” and “capricious” because it applied only to select establishments.<sup>37</sup> Mayor Bloomberg spoke at a press conference later that day, vowed to appeal the judge’s ruling and added, “We have a responsibility as human beings to do something...I’m trying to do what’s right. I’ve got to defend my children...and everybody else...”<sup>38</sup> But not everyone sees eye-to-eye with the Mayor. The ban on sugary drinks has been met with widespread controversy.<sup>39</sup> Opponents argue that § 81.53 is the next chapter in what appears to be a larger pattern of New York City acting as a “nanny state” and infringing on people’s rights.<sup>40</sup>

New York City has long implemented laws and practices aimed at fighting the obesity epidemic in a series of “firsts.”<sup>41</sup> The city was the first in the nation to regulate trans fat from restaurant foods.<sup>42</sup> In 2006, the Big Apple became the first city to adopt menu-labeling requirements when it enacted New York City Health Code § 81.50 (Regulation 81.50),<sup>43</sup> which requires New York City restaurants, including national chain-restaurants, to post calorie content

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of the City of N.Y. (R.C.N.Y.) tit. 24, § 81.53).

<sup>35</sup>The City Record: Official Journal of the City of N.Y., June 19, 2012, at 1574.

<sup>36</sup>CBS NEWS, NYC SODA BAN GOES INTO EFFECT IN MARCH, BUT FINES WON’T START FOR 3 MONTHS (2012), [http://www.cbsnews.com/8301-204\\_162-57564114/nyc-soda-ban-goes-into-effect-in-march-but-fines-wont-start-for-3-months/](http://www.cbsnews.com/8301-204_162-57564114/nyc-soda-ban-goes-into-effect-in-march-but-fines-wont-start-for-3-months/).

<sup>37</sup> CBS NEWS, NOT SO FAST! JUDGE HALTS N.Y.C.’S SUPER-SIZED SUGARY DRINK BAN (2013), <http://newyork.cbslocal.com/2013/03/11/last-day-for-new-yorkers-to-buy-super-sized-sugary-drinks-in-nyc/>.

<sup>38</sup> *Id.*

<sup>39</sup>Alice Park, *Goodbye Big Soda: N.Y. Becomes First City to Ban Large-Sized Soft Drinks*, TIME MAGAZINE (2012), <http://healthland.time.com/2012/09/13/goodbye-big-soda-new-york-becomes-first-city-to-ban-large-sized-soft-drinks/#ixzz2lqOXOCwE>.

<sup>40</sup> Rachel Silberstein, Edgar Sandoval and Simone Weichselbaum, *Bloomy’s Latest ‘Nanny State’ Crackdown Will Curb Junk Food in Hospitals*, N.Y. DAILY NEWS (2012), available at <http://www.nydailynews.com/new-york/bloomy-latest-nanny-state-crackdown-curb-junk-food-hospitals-article-1.1166175>.

<sup>41</sup> See e.g., NYSRA I, 509 F.Supp.2d at 353.

<sup>42</sup> NYC.GOV, MAYOR BLOOMBERG SIGNS LEGISLATION REINFORCING BOARD OF HEALTH’S TRANS FAT RESTRICTION (2007), available at <http://www.nyc.gov>.

<sup>43</sup> N.Y. State Rest. Ass’n v. N.Y. Bd. of Health, 509 F. Supp. 2d 351, 353 (S.D.N.Y. 2007) [hereinafter “NYSRA I”].

information on restaurant menu boards and menus.<sup>44</sup>

These laws have been met with considerable backlash. For example, in 2007, the New York State Restaurant Association (NYSRA), a business association of over 7,000 restaurants, brought suit against New York City, claiming that the Nutrition Labeling and Education Act of 1990 preempted the calorie-count regulation.<sup>45</sup> The NYSRA also claimed that that Regulation 81.50 violated the First Amendment,<sup>46</sup> as it compelled food vendors to convey the government's message regarding the importance of calories.<sup>47</sup>

In order to meet proper federal guidelines, New York City enacted a new § 81.50 (Revised 81.50) on January 22, 2008.<sup>48</sup> The law went into effect on March 31, 2008 but again was met with legal challenges.<sup>49</sup> On appeal, the court held that: (1) New York City law was not preempted by the NLEA; (2) Revised 81.50 merited rational basis review to determine whether it violated the First Amendment and that (3) the New York City law was reasonably related to the City's goal of solving the obesity crisis.<sup>50</sup> Because the government gave § 81.50 only a rational basis review, New York City was able to mandate calorie count menus despite any First Amendment violation.<sup>51</sup> The issue surrounding § 81.50 dealt with compelling the food industry to make alterations to menus.<sup>52</sup> The court did not have to consider any First Amendment issues resulting from a ban on certain foods & packaging, however, in order to combat obesity.

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<sup>44</sup> N.Y.C., N.Y., Health Code §81.50 (2006); NYSRA I, 509 F.Supp.2d at 352 (“This regulation would affect roughly ten percent of restaurants in New York City, including chain restaurants such as McDonald’s”).

<sup>45</sup> *Id.* at 352; *see also* 21 U.S.C. §343.

<sup>46</sup> NYSRA I, 509 F.Supp.2d at 352-53.

<sup>47</sup> NYC.gov, N.Y. State Rest. Ass'n v. N.Y. Bd. of Health (accessed 2013), *available at* [http://www.nyc.gov/html/doh/downloads/pdf/public/calorie\\_court\\_decision\\_041608.pdf](http://www.nyc.gov/html/doh/downloads/pdf/public/calorie_court_decision_041608.pdf).

<sup>48</sup> N.Y.C., N.Y. Health Code §81.50 (2008).

<sup>49</sup> CALIFORNIA CENTER FOR PUBLIC HEALTH ADVOCACY, NUTRITIONAL LABELING IN CHAIN RESTAURANTS: STATE AND LOCAL BILLS/REGULATIONS-2007-2008, at 2, <http://www.cspinet.org/nutritionpolicy/MenuLabelingBills2007-2008.pdf>.

<sup>50</sup> N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health, 556 F.3d 114, 135-36 (2d Cir. 2009).

<sup>51</sup> *See* N.Y. State Rest. Ass'n *supra* note 47.

<sup>52</sup> *Id.*



### III. The Court Responds to NYC's Ban on Sugary Drinks

On May 30, 2013, Mayor Bloomberg began the next chapter in fighting his war against obesity; he proposed nixing the sale of supersized sodas, sweetened teas and coffees, energy drinks and fruit drinks.<sup>53</sup> “Obesity is a nationwide problem, and all over the United States, public health officials are wringing their hands saying, ‘Oh, this is terrible,’” Mr. Bloomberg said in a statement to the New York Times. “New York City is not about wringing your hands; it’s about doing something.”<sup>54</sup>

Still, the proposal was met with immediate criticism. “There they go again,” Stefan Friedman, spokesman for the New York City Beverage Association, told the Associated Press.<sup>55</sup> And there Mayor Bloomberg *went*: on September 13, 2012, the New York City Health Department became the first in the nation to ban the sale of sugared beverages larger than 16 oz. at restaurants, mobile food carts, sports arenas and movie theaters.<sup>56</sup> Shortly thereafter, on October 12, 2012, several food industry groups and unions representing thousands of New Yorkers filed suit against the city, arguing that the ban on sugary drinks was unconstitutional and a violation of the separation of powers doctrine.<sup>57</sup>

On March 11, 2013, New York State Supreme Court Justice Martin A. Tingling heard NY Statewide Coalition of Hispanic Chambers of Commerce, et. al. v. NYC Dept. of Health, which concerned Mayor Bloomberg’s proposed ban on the sale of sugary beverages.<sup>58</sup> The court enjoined New York City from implementing its ban on sugary drinks, a regulation that caused

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<sup>53</sup> See Park, *supra* note 39.

<sup>54</sup> Michael M. Grynbaum, *N.Y. Plans to Ban Sale of Big Sizes of Sugary Drinks*, N.Y. TIMES (2012), available at <http://www.nytimes.com>.

<sup>55</sup> Josh Levs, *N.Y.C. Seeks to Ban Big Sodas From Restaurants, Food Carts*, CNN.COM (2012), <http://www.cnn.com/2012/05/31/us/new-york-sugar-drinks>.

<sup>56</sup> See Park, *supra* note 39.

<sup>57</sup> N.Y. Statewide Coalition of Hispanic Chambers of Comm., et. al. v. N.Y.C. Dept. of Health, 653584/2012, 6, N.Y. State Supreme Court, N.Y. County (2013), available at [online.wsj.com/public/resources/documents/sodaruling0311.pdf](http://online.wsj.com/public/resources/documents/sodaruling0311.pdf).

<sup>58</sup> *Id.*

tremendous public attention for almost a year.<sup>59</sup> In his opinion, the Honorable Martin A. Tingling considered two issues: whether the New York City Board of Health lawfully promulgated the ban on sugary drinks and whether the regulation was arbitrary and capricious.<sup>60</sup>

As to the first issue, the court recognized that the New York legislative body may grant an administrative body certain authority. The court stated that:

A legislative grant of authority must be construed, whenever possible, so that it is no broader than that which the separation of powers doctrine permits...Even under the broadest and most open ended of statutory mandates, an administrative agency may not use its authority as a license to correct whatever social evils it perceives.<sup>61</sup>

The respondents asserted, however, that the New York Legislature granted the Board of Health authority to act as a “quasi legislative body uniquely charged with enacting laws protecting the public health in New York City.”<sup>62</sup> In order to adjudicate this issue, the court invoked a four-part test articulated in Boreali v. Axelrod,<sup>63</sup> in which a group of New York City residents challenged the Public Health Council's approval of a regulation governing tobacco smoking in public areas in 1987. The court analyzed whether 1) the challenged regulation is concerned with issues unrelated to the stated purpose of the regulation; 2) the regulation created its own comprehensive set of rules without the benefit of legislative guidance; 3) the regulation interfered with ongoing legislative debate and/or whether the legislature had an opportunity to address the debate prior to the regulation; and 4) the regulation required the exercise of expertise

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<sup>59</sup> *Id.* at 35. The court states that New York City is “hereby enjoined and permanently restrained from implementing or enforcing § 81.53 of the New York City Health Code.”

<sup>60</sup> *Id.* at 10.

<sup>61</sup> *Id.* at 11. The court cites N.Y. Const. Art. 111 § 1.

<sup>62</sup> *Id.*

<sup>63</sup> Boreali v. Axelrod, 71 N.Y.2d 1, 517 N.E.2d 1350 (1987). In *Boreali*, Fred Boreali, along with several others, brought suit against David Axelrod, the Commissioner of the New York State Department of Health, challenging the Public Health Council's ability to promulgate a ban on indoor smoking. The Court of Appeals of New York held that the Public Health Council abused its authority in promulgating such a rule.

or technical competence on behalf of the body passing the legislation.<sup>64</sup> Judge Tingling found that § 81.53, the ban on sugary drinks, was “laden with exceptions based on economic and political concerns”<sup>65</sup> and cited to Respondent’s brief, stating that § 81.53 was also meant to protect the “economic health” of New Yorkers.<sup>66</sup> It stated that § 81.53 failed the Boreali test and that the Board of Health had usurped legislative power.<sup>67</sup>

As to the second issue, the Petitioners argued that Bloomberg’s ban on sugary drinks, if enacted, would have been arbitrary and capricious.<sup>68</sup> In his opinion, Judge Tingling noted that “a host of other drinks contain substantially more calories and sugar than the drinks targeted [by § 81.53], including alcoholic beverages, lattes, milk shakes, frozen coffees and a myriad of others too long to list here.”<sup>69</sup> The court noted that an individual may be precluded from buying an oversized drink at one location, but may buy it at another next door.<sup>70</sup> In addition, an individual is not precluded under § 81.53 from refilling a smaller-sized beverage container multiple times.<sup>71</sup>

While the Petitioners claimed that § 81.53 violated the Constitution, the court narrowly focused on whether the regulation violated the separation of powers doctrine by applying the Boreali v. Axelrod test and traced the historical development of the New York City Board of Health.<sup>72</sup> Notably absent from the thirty-six page opinion is any mention of a constitutional violation, including how § 81.53 places First Amendment values at stake.<sup>73</sup> The First

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<sup>64</sup> *Id.*

<sup>65</sup> See N.Y. Statewide Coalition of Hispanic Chambers of Comm., *supra* note 57 at 15.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 25-30. Judge Tingling reviews the history of the New York City Board of Health, tracing its power and major initiatives over centuries.

<sup>68</sup> *Id.* at 9.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 10.

<sup>71</sup> *Id.*

<sup>72</sup> See Boreali *supra* note 63.

<sup>73</sup> See N.Y. Statewide Coalition of Hispanic Chambers of Comm., *supra* note 57 at 15.

Amendment played a prominent role in the discussion over calorie count menus,<sup>74</sup> but with respect to Mayor Bloomberg's newest endeavor, the judge made no mention of the effect that § 81.53 would have on advertising, a form of speech, if implemented.<sup>75</sup> The judge never referenced man's special relationship with food and the effect that banning oversized sugary drinks would have on individuals' speech.<sup>76</sup>

#### IV. Placing Government Limits on Consumer Food Choices Compromises Speech

##### A. § 81.53 Violates Commercial Speech Protections

For generations, beverage companies have advertised by placing large logos, graphics and slogans across product containers.<sup>77</sup> This form of advertising has been so popular and so successful that there is even a museum dedicated to the subject.<sup>78</sup> In the early 1990s, for example, Coca Cola, through its "OK Coke" campaign, used beverage containers to advertise Coca Cola and promote certain ideas, values and attitudes to consumers.<sup>79</sup> The cans displayed cubist looking figures,<sup>80</sup> targeted Generation X consumers and implicitly aimed to mock the "*I'm OK, You're OK*" pop-psychology of the 1970s<sup>81</sup> with printed tag-lines on each beverage container.<sup>82</sup> During the OK Coke campaign, Coca Cola used its product containers to promote its brand as well as a certain attitude; by varying the tag-line on each container, it also afforded consumers the opportunity to use the beverage container as a vehicle to project an attitude or

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<sup>74</sup> See *supra* discussion of § 81.50.

<sup>75</sup> *Id.*

<sup>76</sup> See N.Y. Statewide Coalition of Hispanic Chambers of Comm., *supra* note 57.

<sup>77</sup> WIKIPEDIA, BEVERAGE CAN PRINTING (2013), [http://en.wikipedia.org/wiki/Beverage\\_can\\_printing](http://en.wikipedia.org/wiki/Beverage_can_printing).

<sup>78</sup> Bob Carter, *Museum Of Beverage Containers & Advertising*, FAMILY TRAVEL NETWORK (2013), [http://www.familytravelnetwork.com/articles/ft\\_23\\_bev\\_museum.asp](http://www.familytravelnetwork.com/articles/ft_23_bev_museum.asp). The Museum of Beverage Containers & Advertising is located just outside of Nashville, Tennessee and has been opened since 1987. *Id.*

<sup>79</sup> WIKIPEDIA, OK SODA (2013), [http://en.wikipedia.org/wiki/OK\\_Soda](http://en.wikipedia.org/wiki/OK_Soda).

<sup>80</sup> TIME MAGAZINE, TOP 10 BAD BEVERAGE IDEAS (2013), [http://www.time.com/time/specials/packages/article/0,28804,1913612\\_1913610\\_1913608,00.html](http://www.time.com/time/specials/packages/article/0,28804,1913612_1913610_1913608,00.html).

<sup>81</sup> See *supra* note 79.

<sup>82</sup> *Id.* Some of the logos printed on OK Coke cans included: "OK Soda may be the preferred drink of other people such as yourself"; "Please wake up every morning knowing that things are going to be OK"; "OK Soda does not subscribe to any religion, or endorse any political party, or do anything other than feel OK"; "The better you understand something, the more OK it turns out to be." *Id.*

belief statement to others.<sup>83</sup>

Today, companies continue to use beverage containers as a form of advertising.<sup>84</sup> During the months leading up to the 2012 Olympic games in London, for example, McDonald's printed its company logo along with the words "Proud Partner" on its Coca-Cola beverage containers, advertising not only the McDonald's brand, but the company's proud sponsorship of the Olympic games.<sup>85</sup> And on a more basic level, companies continue to use large beverage containers to display company logos and slogans: the larger the container, the larger the logo and the larger the slogan. Thus, as these examples suggest, were any of the aforementioned product containers to be banned (like the McDonald's containers, for instance), the product regulation would interrupt advertising and, as in the case of the OK Coke cans, for example, a transmission of ideas.

The line distinguishing between product regulation and advertising regulation is blurry, especially in New York City.<sup>86</sup> Tobacco companies have argued that government bans on tobacco are both a form of product regulation and commercial speech regulation, protected by the First Amendment.<sup>87</sup> In fact, just a few days after Judge Tingling overruled the ban on oversized sugary drinks, Mayor Bloomberg was in the spotlight once again, only this time proposing a new regulation that would "prohibit display of tobacco products in most retail shops."<sup>88</sup> The National Association of Tobacco Outlets (NATO) immediately responded, stating

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<sup>83</sup> See *infra* discussion Part II to learn more about individual speech and signification through food.

<sup>84</sup> See *infra* discussion.

<sup>85</sup> See e.g., THE BULL RUNNER, CELEBRATE THE LONDON 2012 OLYMPICS WITH MCDONALD'S! WIN COCA-COLA LONDON 2012 OLYMPIC GLASSES! (2012), available at <http://thebullrunner.com/2012/07/celebrate-the-london-2012-olympics-with-mcdonalds-win-coca-cola-london-2012-olympic-glasses/>.

<sup>86</sup> Samantha K. Graff, *First Amendment Implications of Restricting Food and Beverage Marketing in Schools*, 615 ANNALS AM. ACAD. POL. & SOC. SCI. 158, 163 (2008).

<sup>87</sup> See e.g., *Lorillard v. Reilly*, 533 U.S. 525, 570 (2001) (declining to distinguish between product regulation and commercial speech regulation). The Supreme Court also noted that the way products are displayed may trigger First Amendment review. *Id.* 569-70.

<sup>88</sup> Tracy Connor, *After Big Soda Ban, NYC's Mayor Bloomberg Wants To Hide Cigarettes*, NBC NEWS (2013),

that “retailers are responsible business people...and there are First Amendment protections that extend to advertising.”<sup>89</sup> Tom Bryant, NATO’s executive director commented: “You’re talking about a basic right under the Constitution. If you do this with cigarettes and tobacco products, what else is going to have to be out of view? Wine and spirits? It’s a very slippery slope.”<sup>90</sup> These same concerns should, in theory, extend to large sugary beverages. New York City is infringing upon First Amendment values by prohibiting the display of logos, slogans and other messages through the ban of large sugary drinks. What Judge Tingling bypassed in his decision was a robust and important (albeit murky) discussion of how § 81.53, by regulating not only a product but advertising as well, places First Amendment values in peril.<sup>91</sup>

Between the 1940s and 1970s, the Supreme Court generally viewed advertising as a standard business practice that was subject to government regulation rather than a form of expression.<sup>92</sup> The court believed that the First Amendment protected only “pure speech” that related to “truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government.”<sup>93</sup> The court held that advertising did not concern the First Amendment and could be curtailed by government for the purpose of advancing the health, safety and welfare of the community.<sup>94</sup>

However, in 1976, the Supreme Court revisited whether advertising may be afforded First Amendment Protection in Virginia State Board of Pharmacy v. Virginia Citizens Consumer

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available at <http://news.ca.msn.com/top-stories/after-big-soda-ban-nycs-mayor-bloomberg-wants-to-hide-cigarettes>.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> See N.Y. Statewide Coalition of Hispanic Chambers of Comm., *supra* note 57.

<sup>92</sup> See Alex Kozinski & Stuart Banner, *The Anti-history and Pre-history of Commercial Speech*, 71 TEX. L. REV. 747 (1993).

<sup>93</sup> *Roth v. U.S.*, 354 U.S. 476, 484 (1957). The court allowed narrow content-based restrictions on speech to be considered of low social value. *Id.*

<sup>94</sup> *Id.*

Council.<sup>95</sup> In Virginia Pharmacy, the Court introduced a “commercial speech doctrine” that included advertising in its purview.<sup>96</sup> It examined the importance of the free expression of commercial information to the individual consumer as well as to society at large. The Court stated that “advertising, however tasteless and excessive it sometimes may seem,” is essentially the marketplace of ideas in a functioning democracy.<sup>97</sup> Since the Supreme Court’s holding, advertising has been treated as a First Amendment issue, though it receives less government protection than ordinary, individual speech.<sup>98</sup>

In 1980, the United States Supreme Court created a framework for commercial speech protection inquiry in Central Hudson Gas & Electric Corp v. Public Service Commission.<sup>99</sup> In order for commercial speech regulation to be valid, “a court must look at whether: (1) the expression concerns lawful activity and is not misleading; (2) the government’s interest is substantial; (3) the restriction directly serves the asserted interest; and (4) the restriction is no more extensive than necessary.”<sup>100</sup>

Under this test, commercial food advertising has been found to violate food companies’ free speech protection.<sup>101</sup> Courts have acknowledged, however, that in some instances, protecting the public’s health may be considered a substantial interest, thus supporting regulation over countervailing First Amendment concerns.<sup>102</sup> What is important to note is that Judge Tingling did not even briefly address the ways in which First Amendment rights would yield to §

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<sup>95</sup> 425 U.S. 748 (1976). The United States Supreme Court ruled that Virginia could not limit pharmacists’ right to provide information about prescription drug prices. The Court acknowledged that this case was not only about commercial regulation but also about the flow of information between pharmacists and consumers. *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 765.

<sup>98</sup> See *infra* discussion accompanying notes 99-103.

<sup>99</sup> Central Hudson Gas & Electric Corp. v. Pub. Serv. Comm’n, 447 U.S. 557, 566 (1980). In this case, the Supreme Court examined a ban prohibiting electrical utilities from taking part in promotional advertising. *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> See e.g., 44 Liquormart, Inc. v. R.I., 517 U.S. 484 (1996). The Supreme Court held that a Rhode Island law that banned the advertising of liquor prices except within liquor stores violated the First Amendment. *Id.*

<sup>102</sup> Rebecca S. Fribush, *Putting Calorie And Fat Counts On The Table: Should Mandatory Nutritional Disclosure Laws Apply To Restaurant Foods?*, 73 GEO. WASH. L. REV. 377, 388 (2005).

81.53, if implemented.<sup>103</sup> This is disconcerting, as § 81.53 does not appear to meet all four prongs of the Central Hudson test.<sup>104</sup> If the ban on sugary drinks is upheld on appeal, it would appear that New Yorkers' First Amendment rights will be jeopardized.

Certainly, government has long preserved its power to regulate the food market by allowing and disallowing certain products to enter the commercial stream.<sup>105</sup> At first glance, the New York City ban on sugary beverages appears to be part of a tradition of government-imposed food bans.<sup>106</sup> True, a purported aim of the regulation has been to protect the public's health. "If you know [that drinking sugary beverages] are harmful to people's health, common sense says if you care, you might want to stop doing that," Michael Bloomberg has repeatedly remarked.<sup>107</sup> On reflection, however, it appears that § 81.53 of the Rules of the City of New York is misleading.<sup>108</sup> The Mayor, along with the Board of Health, has emphasized other motives in

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<sup>103</sup> See N.Y. Statewide Coalition of Hispanic Chambers of Comm., *supra* note 57.

<sup>104</sup> See *infra* discussion.

<sup>105</sup> See U.S. Const. art. I, § 8, cl. 3 (Congress had the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes"); see also *U.S. v. Walker*, 657 F.3d 160, 181 (3d Cir. 2011) (acknowledging that "Congress has the power to regulate that market just as it has the power to regulate food and drugs in general").

<sup>106</sup> PUBLIC BROADCASTING SERVICE (PBS), *PROHIBITION* (2013), available at <http://www.pbs.org/kenburns/prohibition/unintended-consequences/>; see also DELISH.COM, *BANNED FOOD: FROM THE STRICTLY CONTROLLED TO THE DOWNRIGHT ILLEGAL* (2013), available at <http://www.delish.com/food-fun/banned-food#slide-1>. The site provides examples of federal and state bans and restrictions over food and beverages. *Id.*

<sup>107</sup> Jennifer Peltz, *Judge Strikes Down NYC Ban on Supersized Sodas*, *TIME* (2013), available at <http://healthland.time.com/2013/03/11/judge-strikes-down-nyc-sugary-drinks-size-rule/#ixzz2OxGovEa6>. Note that lawmakers across the country have commented on government having a substantial public-health related interest in banning soda. For example, Catherine Templeton, director of the Department of Health and Environmental Control in South Carolina, is currently urging lawmakers in her state to limit childrens' access to soda. She has said, "I am charged with finding ways to address the obesity epidemic in South Carolina. One way is by reducing the poor quality of nutrition available [to them]." Joey Hollemen, *S.C. Officials Consider Food Stamp Soda Ban in Obesity Battle*, *MIAMI HERALD* (2013), available at <http://www.miamiherald.com/2013/02/01/3211725/sc-health-officials-consider-food.html>.

<sup>108</sup> See *infra* discussion notes 109-116. Additionally, it is important to note that the ban on 16 oz. sugary drinks is different than the city's recent calorie-count legislation, where the Second Circuit Court of Appeals found a substantial interest behind the legislation, based on medical observations and data offered by the government. *N.Y. State Rest. Ass'n*, 556 F.3d 114 at 134. The city claimed that obesity is a factor that contributes to several chronic diseases including stroke, diabetes, heart disease, cancer, and asthma. DEPT. OF HEALTH AND MENTAL HYGIENE BD. OF HEALTH, NOTICE OF INTENTION TO REPEAL AND REENACT §81.50 OF THE N.Y.C. HEALTH CODE 4 (Jan. 22, 2008), available at <http://www.nyc.gov>. In the case of menu labeling, the Second Circuit recognized the strong correlation between the obesity epidemic and caloric intake and found that New Yorkers consume most of their calories outside



passing the 16 oz. soda ban, beyond merely protecting the health, safety, welfare and morals of its citizens.<sup>109</sup> For example, he has cited the economic effects of the ban on sugary drinks.<sup>110</sup> First, the ban is meant to save money. According to government reports, obesity-related issues cost New York City \$4.7 billion a year and individual households \$1,500 a year.<sup>111</sup> In addition, obese individuals spend approximately \$1,429 more, on average, than normal-weight individuals.<sup>112</sup> Second, it appears that the soda ban may be a vehicle for New York City to pander to special interest groups and the food industry, both of which fuel the Big Apple's economy.<sup>113</sup> Mayor Bloomberg has stated unequivocally that the 16 oz. ban on sugary drinks is "great for stores and bars and restaurants [and movie theaters] because they will probably charge more for two."<sup>114</sup> Research suggests that "sugary drinks are a major source of business revenue, and businesses will adjust their menus in order to maximize profits."<sup>115</sup> A recent study conducted by the University of California San Diego suggests that were the ban on oversized sugary drinks to go into effect, individuals would continue to buy large quantities of soda, and would even more soda, regardless of any cost increase.<sup>116</sup>

Under the Central Hudson Four Part Test, the government must also show that banning

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the home. Mark Hamblett, *2nd Circuit Upholds NYC Law Requiring Restaurant Chains to Display Calorie Counts*, LAW.COM (2009), <http://www.law.com>.

<sup>109</sup> 71 A.L.R.6th 471 (Originally published in 2012) (citing *Thomas v. Howze*, 348 Fed. Appx. 474 (11th Cir. 2009), cert. denied, 130 S. Ct. 3291, 176 L. Ed. 2d 1196 (2010)).

<sup>110</sup> See *infra* notes 111-16.

<sup>111</sup> Susan Kansagra, *Maximum Size For Sugary Drinks: Proposed Amendment of Article 81 Response to Comments*, NYC.GOV (2012), available at <http://www.nyc.gov/html/doh/downloads/pdf/boh/article81-response-to-comments-ppt.pdf>.

<sup>112</sup> *Id.*

<sup>113</sup> Adam Friedman, Jenifer Becker, *More Than a Link in the Food Chain*, N.Y. Industrial Retention Network And Fiscal Policy Institute (2007), available at [http://www.madeinnyc.org/publications/foodchain\\_07.pdf](http://www.madeinnyc.org/publications/foodchain_07.pdf).

<sup>114</sup> Fareed Zakaria *GPS – Interview with Michael Bloomberg* (CNN television broadcast June 25, 2012).

<sup>115</sup> Ryan Jaslow, *N.Y.C. Soda Ban Would Lead Customers to Consume More Sugary Drinks, Study Suggests*, CBS News (2013), available at <http://www.cbsnews.com>.

<sup>116</sup> *Id.* The study, published on April 10, 2013, offered 100 participants three kinds of menus: one "unregulated" menu, one only offering 16 oz. sodas and one offering "bundles" of soda, all 16 oz. or less. *Id.* Participants bought significantly more "bundles" of soda than individual sodas. *Id.* Brent Wilson, a graduate student at UC San Diego stated that his "research shows that the New York City ban on large-sized drinks may have unintended consequences that policy makers need to consider." *Id.*

the sale of 16 oz. sugary beverages relates to promoting public health in order to bypass any Constitutional free-speech challenge.<sup>117</sup> The Supreme Court has held that a reasonable “fit between the legislature’s ends and the means chosen to accomplish those ends” must be demonstrated.<sup>118</sup> The city’s means to curtail obesity may be deemed unreasonable, however, since the regulation is not really banning very much.<sup>119</sup> It is just making the purchase of sugary drinks more complicated and confusing. As the New York State Supreme Court already noted, the regulation is clearly arbitrary<sup>120</sup> because “the loopholes in this rule effectively defeat the stated purpose of this rule.”<sup>121</sup> As opponents also point out, the ban does not actually limit the amount of sugary beverage sold; rather, it only targets the sale of sugary drinks in a particular sized container.<sup>122</sup> In a recent NYU-affiliated survey, 68% of New Yorkers polled stated that limiting the serving size of soda would not deter or decrease their consumption of soda.<sup>123</sup> In addition, the ban does not take into account that what fills up most of the container is ice and not soda.<sup>124</sup> And the regulation only bans oversized sugary drinks sold in restaurants, mobile food carts, sports arenas and movie theaters.<sup>125</sup>

According to Sun Dee Larson, a spokeswoman for the AMC Theaters chain, the average New Yorker goes to the movies just four times a year and buys concessions only twice.<sup>126</sup> “We firmly believe that the choices made during the other 363 days have a much greater impact on

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<sup>117</sup> See discussion of Central Hudson *supra*, accompanying notes 99-100.

<sup>118</sup> Fla. Bar v. Went For It, Inc., 515 U.S. 618, 632 (1995) (citing Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989)).

<sup>119</sup> Casey Neistat, *Soda Ban Explained*, N.Y. TIMES (2013), available at <http://www.nytimes.com/2012/09/10/opinion/soda-ban-explained.html>.

<sup>120</sup> See CBS NEWS *supra* note 37.

<sup>121</sup> See Hajela, *supra* note 25.

<sup>122</sup> Alva Noë, *Commentary: Ban on Big Sodas A Big Mistake*, NAT’L PUBLIC RADIO (2012), available at <http://www.npr.org/blogs/13.7/2012/09/14/161153355/commentary-ban-on-big-sodas-a-big-mistake>.

<sup>123</sup> SUPERMARKETNEWS.COM, CONSUMERS OPPOSE LIMITS ON SODA SIZE (2013), [http://supermarketnews.com/site-files/supermarketnews.com/uploads/2012/07/DATAPTS\\_0730.jpg](http://supermarketnews.com/site-files/supermarketnews.com/uploads/2012/07/DATAPTS_0730.jpg).

<sup>124</sup> See Noë, *supra* note 122.

<sup>125</sup> See Park, *supra* note 39.

<sup>126</sup> *Id.*

public health,” she said.<sup>127</sup> Grocery stores and small convenience stores, which are far more often frequented, are exempt from the law.<sup>128</sup> Mayor Bloomberg has even noted that the ban does not prevent individuals from purchasing multiple 16 oz. sodas if they choose to.<sup>129</sup> And health officials question why the ban does not cover the sale of candy and other sweets, too, if the ban is meant to curb sugar consumption and in turn, obesity.<sup>130</sup> Thus, the nexus between the Board of Health’s goal to combat obesity and its chosen means of doing so is attenuated; the ban on sugary drinks has several loopholes that do not protect public health.<sup>131</sup>

This should come as little surprise as New York City’s other obesity-fighting laws also have loopholes. Recent studies indicate the mixed success of New York City’s calorie count menu law, for example.<sup>132</sup> One of the main problems with the law is that exemptions are often listed for movie theaters, bowling alleys, amusement parks, and other locations that offer concessions but are not considered a “food business.”<sup>133</sup> In addition, menu labeling tends not to be specific enough; it allows for businesses to post calorie ranges.<sup>134</sup> A recent study conducted by Stanford University on menu-labeling laws in New York City indicates that overall daily calorie consumption dropped by 6% after the city’s regulation but that purchase-behavior at fast food chains did not change.<sup>135</sup> In other words, the law has not really stopped people from consuming foods with a high-calorie, high saturated fat content.

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<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> Alva Noë, *The Value in Sweet Drinks*, NAT’L PUBLIC RADIO (2012), available at <http://www.npr.org/blogs/13.7/2012/09/24/161277720/the-value-in-sweet-drinks>.

<sup>132</sup> Amy Fuller, *FDA-Required Calorie Counts for Fast Food Restaurants Will Not Curb the Obesity Epidemic*, POLICY MIC (2012), available at <http://www.policymic.com/articles/4083/fda-required-calorie-counts-for-fast-food-restaurants-will-not-curb-the-obesity-epidemic>.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

In order to satisfy the last prong of the Central Hudson Four Part Test,<sup>136</sup> the government must show that banning oversized sugary drinks from being sold at certain locations is no more extensive than necessary – that such a regulation is not unnecessarily broad in the fight against obesity. Many New Yorkers argue that New York City’s ban on soda is a radical law with vast consequences on very select locations, thus doing little to truly combat obesity.<sup>137</sup> After Judge Tingling issued his decision, the American Beverage Association and other opponents commented: “The court ruling provides a sigh of relief to New Yorkers and thousands of small businesses in New York City...” and called the ban extensive, “incessant finger-wagging.”<sup>138</sup> As opponents argued, the proposed ban was not properly tailored to achieve the Board of Health’s goal.<sup>139</sup> If implemented, § 81.53 would force a whole host of places: restaurants, mobile food carts, sports arenas and movie theaters to stop offering oversized sugary beverages to customers and as a result, change their product line and suffer adverse financial consequences.<sup>140</sup> Meanwhile, New Yorkers would still be able to purchase large sugary beverages from Seven-Elevens, which would not be affected by the ban and would not stand to suffer any adverse economic consequences.<sup>141</sup> In effect, the regulation would demand sweeping change from small-business food establishments while still allowing consumers considerable access to large sugary beverages elsewhere.

Interestingly enough, both the food industry and Board of Health have conceded in recent weeks and months that obesity rates seem to be leveling in recent years without any ban on sugary beverages.<sup>142</sup> Thus, while protecting public health is clearly a substantial interest, it

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<sup>136</sup> See *supra* discussion accompanying notes 99-101.

<sup>137</sup> See Park, *supra* note 39.

<sup>138</sup> See Peltz, *supra* note 107.

<sup>139</sup> See N.Y. Statewide Coalition of Hispanic Chambers of Comm., *supra* note 57.

<sup>140</sup> See Park, *supra* note 39.

<sup>141</sup> See N.Y. Statewide Coalition of Hispanic Chambers of Comm., *supra* note 57.

<sup>142</sup> *Id.* at 7.

would seem as if Mayor Bloomberg's ban on sugary drinks might be more extensive than necessary, as New Yorkers may already be taking care of the obesity epidemic on their own, without government intervention. Commenting on § 81.53, one member of the city's Board of Health, Dr. Sixto Caro, noted, "I am still skeptical. This [the ban on sugary drinks] is not comprehensive enough."<sup>143</sup> It appears to be overbroad.<sup>144</sup>

### **B. The Ban Compromises Personal Expressive Activity**

Advertising, as a form of commercial speech, has allowed companies to capitalize on individuals' psychological tendencies.<sup>145</sup> It has influenced personal forms of communication, habits, and food choice.<sup>146</sup> Research indicates that "[t]he correlation between what people eat, how others perceive them, and how they characterize themselves is striking."<sup>147</sup> Advertising can affect the foods that an individual consumes and through this process, the individual can express his or her views of the world.<sup>148</sup> A prime example of this phenomenon is Starbucks. The company does not just sell beverages; it sells a sophisticated image and sub-culture.<sup>149</sup> The coffee chain's commodification of a unique culture has "spruce[d] up boring American whiteness"<sup>150</sup> by allowing consumers to express themselves through what they drink.<sup>151</sup> Its products, more expensive than average and with pseudo-Italian names, also create an imaginary class boundary between those who can afford to buy what is considered to be "gourmet coffee"

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<sup>143</sup> See Park, *supra* note 39.

<sup>144</sup> *NCCU Law Alumnus Blocks Bloomberg's Soda Ban*, MUSINGS OF A COMPUTER SCIENTIST TURNED LAW STUDENT (2013), available at <http://www.lawdevnull.com/2013/03/nccu-law-alumnus-blocks-bloombergs-ban/>.

<sup>145</sup> Lauren Hunter and Kristin van Busum, *Soda "Ban" May Actually Increase Freedom of Choice*, HUFFINGTON POST (2012), available at [http://www.huffingtonpost.com/lauren-hunter/new-york-soda-ban\\_b\\_1904920.html](http://www.huffingtonpost.com/lauren-hunter/new-york-soda-ban_b_1904920.html).

<sup>146</sup> *Id.* The authors note that using the term "supersize" has had a psychological effect on consumers, "turning 'large' into a [seemingly] intermediate option, [thus] increasing [consumer's] willingness to purchase more."

<sup>147</sup> PAMELA GOYAN KITTLER & KATHRYN P. SUCHER, *FOOD AND CULTURE* 3 (4th ed. 2004).

<sup>148</sup> *Id.*

<sup>149</sup> ANN HETZEL GUNKEL, *STARBUCKS COFFEE IN AMERICA: CONSUMING THE SIMULATED SUB-CULTURE OF THE SIREN* (2012), available at [http://annhetzelgunkel.com/food/Leigh%20Novak\\_Starbucks.pdf](http://annhetzelgunkel.com/food/Leigh%20Novak_Starbucks.pdf).

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

and those who cannot.<sup>152</sup> As comedian George Carlin explained, “the more complicated the Starbucks order, the bigger the asshole. If you walk into a Starbucks and order a ‘decaf grande half-soy, half-low fat, iced vanilla, double-shot, gingerbread cappuccino, extra dry, light ice, with one Sweet-n'-Low and one NutraSweet,’ ooh, you're a huge asshole.”<sup>153</sup>

In Food and Culture: A Reader, anthropologists Carole Counihan and Penny Van Esterik agree, noting that when a consumer buys food,

the item of food sums up and transmits a situation; it constitutes an information; it signifies. That is to say, [food] is not just an indicator of a set of more or less conscious motivations, but that it is a real sign...[a] functional unit of a system of communication.<sup>154</sup>

Food is a communicative tool that is used to bring people together, similar to dress or language.<sup>155</sup> People create unique social groups through food (and the absence of certain food) just as they do through the spoken word.<sup>156</sup> In fact, there is a whole science dedicated to this phenomenon.

Food signifying (or signaling) is part of semiotics, the study of signs and sign processes.<sup>157</sup> It is a field closely related to linguistics with important anthropological dimensions.<sup>158</sup> Umberto Eco, a famous Italian semiotician, for example, has proposed that every cultural phenomenon can act as form of communication.<sup>159</sup> Food has been a subject of semiotic theory and inquiry because it affects every individual and is largely accessible; it often sends signals on class, culture, societal relations, inclusion and exclusion.<sup>160</sup> Food advertising and

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<sup>152</sup> *Id.*

<sup>153</sup> SNOPE.COM, NEW RULES FOR 2006 (2006), available at <http://www.snopes.com/politics/soapbox/newrules.asp>.

<sup>154</sup> CAROLE CUNIHAN AND PENNY VAN ESTERIK, *FOOD AND CULTURE: A READER* 24 (2012).

<sup>155</sup> KITTLER & SUCHER, *supra* note 147, at 47.

<sup>156</sup> *Id.* For example, people often describe their cultural identity through food choice. *Id.* at 4.

<sup>157</sup> WIKIPEDIA, SEMIOTICS (2013), available at [http://en.wikipedia.org/wiki/Semiotics#cite\\_note-Leeds-Hurwitz.2C\\_W.\\_1993-23](http://en.wikipedia.org/wiki/Semiotics#cite_note-Leeds-Hurwitz.2C_W._1993-23).

<sup>158</sup> *Id.*

<sup>159</sup> MICHAEL CAESAR, UMBERTO ECO: PHILOSOPHY, SEMIOTICS, AND THE WORK OF FICTION 55 (1999).

<sup>160</sup> See generally W. LEEDS-HURWITZ, *SEMIOTICS AND COMMUNICATION: SIGNS, CODES, CULTURES* (1993).

branding have increased the ways by which an individual may send signals or messages through food by creating new cultural associations and unique messages.<sup>161</sup>

Given an individual's ability to make unique decisions about food consumption based on personal values,<sup>162</sup> it seems logical that there are expressive values attached to food. A ban on sugary drinks in New York City would severely limit certain individuals' ability to signify their values.<sup>163</sup> Since most New Yorkers hold a "signature drinking type"<sup>164</sup> (ordering coffee, tea or supersized sodas with a certain frequency and specificity<sup>165</sup>), it should come as no surprise that a recent New York Times poll found that the majority of New Yorkers in every borough are against the ban on sugary drinks.<sup>166</sup> Many of them are people who drink and value large quantities of soda regularly.<sup>167</sup>

Karen Knowler, a food coach and author of Eat Right for Your Personality Type, says that food signifies various "eating personalities" as well.<sup>168</sup> She claims that what we drink reflects an attitude in addition to a simple preference.<sup>169</sup> Signified personalities include the "conscious eater", the "confused eater", the "emotional eater", the "sensual eater", the "focused eater", and the "functional eater", each of which migrates towards certain food and drinks to project this personality-type.<sup>170</sup> Thus, individuals who drink oversized sugary beverages a distinct "eating personality."

For now, New Yorkers are free to chug supersized sodas and reveal their distinct

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<sup>161</sup> See discussion *supra* of Starbucks. See also discussion *supra* of the OK Coke campaign.

<sup>162</sup> KITTLER & SUCHER, *supra* note 147, at 3.

<sup>163</sup> See example *infra* of Sarah Palin's recent appearance at the CPAC Convention.

<sup>164</sup> Kyrsty Hazell, *What Your Eating Type Reveals About Your Personality*, HUFFINGTON POST (2013), available at [http://www.huffingtonpost.co.uk/2012/02/23/what-your-eating-type-reveals-about-your-personality\\_n\\_1296749.html](http://www.huffingtonpost.co.uk/2012/02/23/what-your-eating-type-reveals-about-your-personality_n_1296749.html).

<sup>165</sup> See Peltz, *supra* note 107.

<sup>166</sup> See Park, *supra* note 39.

<sup>167</sup> See Noš, *supra* note 131.

<sup>168</sup> See Hazell, *supra* note 164.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

personalities in front of the cops if they like. As one commentator wrote, “it’s easy to dismiss [individuals’] inalienable right to disgustingly large quantities of chemical-flavored brown water” but the fact that the city has done worse things than ban soda should not excuse New York City’s assault on individuals’ right to signify.<sup>171</sup> Libertarians and now, an emerging group of “soda libertarians”, are making the case that “the Board of Health’s assault on sweet things follows the same logic as outdoor smoking restrictions and bans on trans fats that have spread from New York to California and throughout the US” and has caused “some of our biggest policy disasters.”<sup>172</sup> These groups argue that the New York City government ban on soda falls in line with other heavy-handed “big-government” laws, like those that crack down on “lemonade stands, and that much touted hippie-panacea, raw milk.”<sup>173</sup> Their argument is clear: an individual’s right to drink soda is inextricably linked to the right to control his own body, a right that government “has demonstrated time and again that it has no interest in letting [individuals] claim.”<sup>174</sup>

In opposing the § 81.53 of the Rules of the City of New York, soda libertarians argue that the greatest purpose of government should not be to dictate how individuals should lead their lives down to the most minute detail.<sup>175</sup> Similarly, America’s Founding Fathers recognized that overbearing and concentrated power is dangerous to personal liberties, including freedom of speech.<sup>176</sup> The system of checks and balances that was built into the framework of the federal government was meant to acknowledge the imperfection of government officials and serve as a

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<sup>171</sup> Lucy Steigerwald, *Why New York’s Failed Soda Ban Matters*, VICE UNITED STATES (2013), available at <http://www.vice.com/read/why-new-yorks-failed-soda-ban-matters>.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> Peter Roff, *Americans Don’t Want a Bloomberg Nannystate*, U.S. NEWS AND WORLD REP. (2013), available at <http://www.usnews.com/opinion/blogs/peter-roff/2013/03/12/bloomberg-soda-ban-fail-a-victory-for-personal-freedom>.

<sup>176</sup> *Id.*



safeguard to protect individual rights.<sup>177</sup> Judge Tingling's ruling was a major victory for personal liberties, including First Amendment values, and an anomaly in New York City courts.<sup>178</sup>

A couple of weeks after the ruling, Sarah Palin brought attention to the city's attempted assault on personal liberties and reminded individuals to safeguard personal rights in the face of big government.<sup>179</sup> Speaking to a large crowd at the national CPAC Convention, Sarah Palin took a sip from an oversized Big Gulp soda mid-way through her speech.<sup>180</sup> While she was drinking the soda, the crowd rose to their feet and cheered in applause.<sup>181</sup> "Oh Bloomberg's not around. Our Big Gulp's safe. We're cool. Shoot, it's just pop with 'low-cal' ice cubes in it. I hope that's okay," she remarked.<sup>182</sup> As commentators and attendees quickly noted, Palin was doing more than simply drinking an oversized soda. She consciously intended to send a message: "*Don't tell us real Americans how to live our lives. We'll decide what's best for ourselves and our children. Stop treading on our liberty.*"<sup>183</sup> By drinking from the Big Gulp on stage, Sarah Palin projected a political attitude and opinion that was equally as successful as saying the words aloud. Implicit in her demonstration was an understanding of the strong nexus between man and food, between an individual's body and speech, as well as an acknowledgment of food's expressive qualities.

## V. Countervailing Considerations

Both proponents and opponents of the ban on sugary drinks agree that if resurrected, the

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<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> See *infra* discussion of Sarah Palin at the 2013 CPAC Convention.

<sup>180</sup> Scott Galupo, *Sarah Palin's Big Gulp Attitudinizing*, THE AMERICAN CONSERVATIVE (2013), <http://www.theamericanconservative.com/sarah-palins-big-gulp-attitudinizing/>.

<sup>181</sup> Igor Volsky, *Sarah Palin Drinks Big Gulp During CPAC Speech: 'Shoot, It's Just Pop!'*, THINKPROGRESS (2013), <http://thinkprogress.org/health/2013/03/16/1731301/sarah-palin-drinks-big-gulp-during-cpac-speech-shoot-its-just-pop/?mobile=nc>.

<sup>182</sup> See *supra* note 180.

<sup>183</sup> *Id.*

regulation would not completely enjoin the sale of oversized sugary drinks. The many exceptions to the ban could, in fact, significantly compromise the ban. For example, what should constitute a “sugary drink” remains, in and of itself, a significant matter of debate.<sup>184</sup> As written, Bloomberg’s regulation includes only non-alcoholic, sugar-sweetened drinks with more than 25 calories per eight ounces of fluid and excludes beverages that contained 50% or more milk or a milk substitute.<sup>185</sup> So while the sale of large sodas would be discontinued, the sale of other oversized, sugary, high-calorie drinks like the 16 oz. McDonald’s McCafé Chocolate Shake (700+ calories), the 16 oz. Starbucks’ Double Chocolate Chip Frappuccino (410+ calories) or the standard margarita (500+ calories) would not be interrupted.<sup>186</sup> Thus, companies would still be able to advertise on large sugary-beverage containers and people would still be able to signify through large drinks, though perhaps with less ease.

Additionally, the ban on sugary drinks would only regulate speech at limited locations. Restaurants, movie theaters and push carts would be forced to get rid of their supersize drinks, but grocery stores, convenience stores, 7-Elevens and bodegas could continue to sell oversized sugary drinks without any adverse consequence.<sup>187</sup> If the ban goes into effect, it would still be possible for companies to advertise on large sugary drinks and for people to signify at a majority of locations. Moreover, Bloomberg’s ban does not prevent an individual from refilling an 8 oz. sugary beverage or from adding extra sugar to a beverage.<sup>188</sup> The city government has also emphasized that individuals are able to order multiple smaller containers, if they wish.<sup>189</sup> Thus, it would appear that Mayor Bloomberg’s ban might not be so limiting after all. There would still

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<sup>184</sup> Deena Shanker, *Why Bloomberg’s Soda Ban Fizzled*, GRIST (2013), <http://grist.org/food/why-bloombergs-soda-ban-fizzled/>.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> See FROM SUPERSIZED TO HUMAN-SIZED, *supra* note 31.

be wide availability of oversized sugary drinks and individuals would only be subject to few limitations.<sup>190</sup> As David Just, a professor of behavioral economics at Cornell University has commented, individuals who want large sodas and are unable to buy one will “display a reactance – a rebelliousness, a determination to circumvent this policy, an attitude of ‘I’ll show them.’ And the people selling the soda are all too willing to comply.”<sup>191</sup> If the ban is upheld on appeal, New Yorkers who want oversized sugary drinks will undoubtedly find ways to circumvent the regulation.<sup>192</sup>

From an academic standpoint, it is unclear whether First Amendment scholars – particularly those that adhere to a *Madisonian* conceptualization of the First Amendment<sup>193</sup> – would rebuke any attempt to link the First Amendment to Michael Bloomberg’s ban. A Madisonian scholar might argue that Bloomberg’s soda ban, proposed to combat an obesity epidemic has little to do with driving a “government by discussion”<sup>194</sup> or a deliberative democracy.<sup>195</sup> The fact that Mayor Bloomberg’s ban on sugary drinks does not drive towards some greater political truth might suggest that the regulation falls outside the boundaries of Madisonian First Amendment jurisprudence.<sup>196</sup> Even Madison himself might argue that a deregulated market that neglects the obesity epidemic (a very real public issues outside of the political sphere) demands greater education rather than First Amendment regulation.<sup>197</sup>

While these considerations may soften the ban on sugary drinks by emphasizing certain

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<sup>190</sup> *Id.*

<sup>191</sup> See *supra* note 115.

<sup>192</sup> See Shanker, *supra* note 184.

<sup>193</sup> See CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* (1995). In his book, Sunstein, a legal scholar and commentator, discusses a “Madisonian” conceptualization of the First Amendment, that is, one that drives government by discussion. *Id.* at 19. According to Sunstein, First Amendment protection should be limited to matters dealing with the political process. *Id.* at 18-21. Political speech should be protected since it is fundamental to the functioning of a democracy whereas non-political speech should be afforded less protection. *Id.*

<sup>194</sup> *Id.* at 19.

<sup>195</sup> *Id.* at 19-20.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 21, 269-70. Sunstein points out the important role that education plays in shaping America’s social issues.

gaps, many argue that the Mayor's regulation has "ensure[d] broad communication about matters of public concern," and if imposed, will create certain "outcomes [by] help[ing] move judgments in [what the government considers to be] appropriate directions."<sup>198</sup> Given food's ability to signify, the ban still arbitrarily impedes free speech irrespective of how much speech. The government should not invoke health and commerce as a shield to violate the First Amendment even if the ban is, as written, non-absolute.<sup>199</sup> If a bright line is not drawn between invasion and non-invasion of speech, Mayor Bloomberg's regulation will give rise to a slippery slope, one that governments will rely on to pass draconian laws, similar to those passed generations ago, that strip away individuals' First Amendment rights and other personal liberties.<sup>200</sup>

In fact, the legal, political and social activity related to Mayor Bloomberg's proposed ban on sugary drinks is reminiscent of the federal prohibition of alcohol during the early twentieth century. Opponents of the prohibition movement believed that the government's decision to bar alcohol was arbitrary and capricious and did not match the general public sentiment, that it invaded liberties and that alcohol signified a whole host of qualities, including class status and culture.<sup>201</sup> If the New York courts do not draw a bright line distinguishing between acts that obstruct and do not obstruct speech, they will be opening the window for the New York City government to create even bolder food regulations echoing those in place almost a century ago.

## VI. Conclusion

When Mayor Bloomberg unveiled his proposal to first ban oversized sugary drinks last May, no reference was made as to consumer choice or the need to educate New Yorkers about

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<sup>198</sup> *Id.* at 19.

<sup>199</sup> Danielle Weatherby & Terri R. Day, *The Butt Stops Here: The Tobacco Control Act's Anti-Smoking Regulations Run Afoul of the First Amendment*, 76 ALB. L. REV. 121 (2013). The authors address how government has used the Commerce Clause to chip away First Amendment values. *Id.* at 164-65.

<sup>200</sup> See *infra* discussion accompanying note 201.

<sup>201</sup> NAT'L COMM'N ON LAW OBSERVANCE AND ENFORCEMENT, R. ON THE ENFORCEMENT OF THE PROHIBITION LAWS OF THE U.S., *Bad Features of the Present Situation and Difficulties in the Way of Enforcement* (1931).

the dangers of high calorie consumption.<sup>202</sup> As a result, Coke issued a statement: “New Yorkers expect and deserve better than this. They can make their own choices about the beverages they purchase.”<sup>203</sup> Pepsi, in turn, emblazoned their trucks with signs that read, “Don’t let bureaucrats tell you what size beverage to buy.”<sup>204</sup> Local beverage groups also responded to Mayor Bloomberg’s actions, stating, “diet companies often emphasize choice and options in their own plans, allowing their customers a wide variety of food and drink. We want the same thing.”<sup>205</sup> New York City could have tackled the obesity epidemic by strengthening consumer protection laws instead of devising a ban on large sugary beverages. Such a strategy would have incentivized food companies to warn consumers about the dangers of obesity with minimal government interference. The city could have also devised public-service infomercials similar to those currently being broadcast to dissuade individuals from smoking;<sup>206</sup> this would have educated individuals on nutrition and protected them from falling prey to the food-industry. As New York Times Pulitzer Prize-winning author and investigative journalist Michael Moss noted in a recent interview regarding his book, Salt Sugar Fat: How the Food Giants Hooked Us, the United States food industry is a colossal enterprise with nearly \$1 trillion a year in sales.<sup>207</sup> He explained that if individuals do not learn what to buy or how much to eat, the food industry will find a way to target individuals’ cravings for salt, sugar and fat irrespective of any ban

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<sup>202</sup> See The City Record, *supra* note 34.

<sup>203</sup> Alan Rappeport, *Weight-loss Groups Back NY Big Soda Ban*, FINANCIAL TIMES (2012), available at <http://www.ft.com/intl/cms/s/0/fe5929bc-f6c4-11e1-827f-00144feabdc0.html>.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> CENTER FOR DISEASE CONTROL, TIPS FROM FORMER SMOKERS - VIDEOS (2013), <http://www.cdc.gov/tobacco/campaign/tips/resources/videos/>.

<sup>207</sup> AMAZON.COM, Q&A WITH MICHAEL MOSS (2013), <http://www.amazon.com/Salt-Sugar-Fat-Giants-Hooked/dp/1400069807>; see also Hannah Wallace, ‘Salt Sugar Fat: How the Food Giants Hooked Us’ by Michael Moss, WASH. POST (2013), available at [http://articles.washingtonpost.com/2013-03-22/opinions/37933765\\_1\\_salt-sugar-fat-junk-food-big-food](http://articles.washingtonpost.com/2013-03-22/opinions/37933765_1_salt-sugar-fat-junk-food-big-food).

promulgated by the government.<sup>208</sup>

Other New Yorkers have offered commentary on the city's endeavor to ban oversized sugary drinks. Rick Hills, a New York University law professor acknowledged that the ban on sugary beverages, if upheld on appeal, would open a "pandora's box" for government interference, one that would allow New York City to potentially "ban red meat – or even all animal products – without violating a person's right to life, liberty and the pursuit of happiness."<sup>209</sup> New Yorkers are questioning what is next on the list. The 16 oz. strip steak?<sup>210</sup> Butter?<sup>211</sup> Blogger Michael Moore stated, "EDUCATE not LEGISLATE....this country is turning into a 'dictatorship.' Was [this] the wish of the people? Don't think so."<sup>212</sup> The American Heart Association agreed, concluding in a recent study that to combat obesity, "evidence supports the value of...on-site educational programs...subsidies for fruits and vegetables, taxes, school gardens, worksite wellness programs."<sup>213</sup> United States Senator Kirsten Gillibrand, the first New York Senator to sit on the Senate Agriculture Committee in nearly forty years, has also commented on the need to strengthen on-site educational programs in order to ensure that Americans are eating smart.<sup>214</sup>

While the future of sugary drinks in New York City remains unclear, and while Mayor Bloomberg is certain to wage a contentious legal battle to implement § 81.53, one thing remains certain: the ban on sugary drinks places much more at stake than simply the future of oversized

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<sup>208</sup> Scott Mowbray, *You Really Can't Eat Just one, and Here's the Reason*, N.Y. TIMES (2013), available at [http://www.nytimes.com/2013/03/18/books/salt-sugar-fat-by-michael-moss.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/03/18/books/salt-sugar-fat-by-michael-moss.html?pagewanted=all&_r=0)

<sup>209</sup> *N.Y. Large Soda Ban to Open Legal Battle*, WJLA.COM (2012), available at <http://www.wjla.com/articles/2012/06/new-york-large-soda-ban-to-open-legal-battle--77055.html>.

<sup>210</sup> *Id.*

<sup>211</sup> Sidsel Overgaard, *Danes May Bring Back Butter as Government Rolls Back "Fat Tax"*, NAT'L PUBLIC RADIO (2012), available at <http://m.npr.org/news/Business/164952281>.

<sup>212</sup> See Park, *supra* note 39.

<sup>213</sup> See Block, *supra* note 29. Notably absent from the American Heart Association's recommendation is a ban on sugary drinks.

<sup>214</sup> KIRSTEN GILLIBRAND – U.S. SENATOR FOR N.Y., AGENDA – IMPROVING FOOD SAFETY (2013), <http://www.gillibrand.senate.gov/agenda/improving-food-safety>. In a video posted on her website, Senator Gillibrand says, "We need better information...we need to make sure families have access to that information."

beverages.<sup>215</sup> New Yorkers should recognize that Bloomberg's ban jeopardizes First Amendment values, along with other rights.<sup>216</sup> As Justice Tingling wrote in his March 11, 2013 ruling, Mayor Bloomberg, by championing the ban on sugary drinks, had interpreted the Board of Health's powers broadly enough to "create an administrative Leviathan," able to create any rule and "limited only by its own imagination."<sup>217</sup> For the sake of protecting the First Amendment, let one hope that the Board's imagination, along with the ban on oversized sugary drinks, quickly fizzles.

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<sup>215</sup> See *supra* discussion Part II.

<sup>216</sup> *Id.*

<sup>217</sup> Michael M. Grynbaum, *Judge Blocks N.Y.C.'s Limits on Big Sugary Drinks*, N.Y. TIMES (2013), available at [http://www.nytimes.com/2013/03/12/nyregion/judge-invalidates-bloombergs-soda-ban.html?ref=nyregion&\\_r=0](http://www.nytimes.com/2013/03/12/nyregion/judge-invalidates-bloombergs-soda-ban.html?ref=nyregion&_r=0).